United States Department of Labor
Employees' Compensation Appeals Board

D.H., Appellant	)	
and	)	**Docket No. 08-867**
	)	**Issued: August 6, 2008**
DEPARTMENT OF ENERGY, BONNEVILLE POWER ADMINISTRATION, Vancouver, WA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 4, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' January 9, 2008 decision denying his hearing loss claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish that he sustained a hearing loss in the performance of duty.

FACTUAL HISTORY

On December 10, 2006 appellant, a 62-year-old heavy truck driver, filed an occupational disease claim alleging that he sustained bilateral hearing loss as a result of work-related noise exposure. He first realized that his hearing loss was employment related on May 11, 1999. Appellant did not stop work. In an accompanying statement, he reiterated his contention that his exposure to noise in his positions as a rigger and construction fitter since 1988 caused his hearing

loss. Appellant indicated that the employing establishment did not require hearing protection, but that he wore soft rubber earplugs when possible.[1]

In support of his claim, appellant submitted an unsigned chronology of audiogram results from the employing establishment for the period January 18, 1989 through April 16, 2006. A December 11, 2006 report of an osteopathic evaluation, bearing an illegible signature, reflected evidence of high frequency hearing loss in both ears.

Appellant submitted audiologist reports dated February 28, 1999 to February 3, 2003, either unsigned or bearing illegible signatures, reflecting bilateral hearing loss. The record also includes a July 29, 2004 medical clearance form from Dr. Douglas Myers, an otolaryngologist, and an accompanying audiogram of that date. The form report indicated that appellant might be a candidate for a hearing aid.

On July 3, 2007 the Office asked the employing establishment to describe appellant's past exposure to noise. On July 9, 2007 the employing establishment indicated that appellant had been exposed to loud equipment, including diesel trucks, heavy machinery and generators for 8 to 10 hours per day during the course of his employment. In a statement of accepted facts dated November 15, 2007, the Office accepted that appellant worked in a loud industrial environment operating heavy equipment for many years.

The Office referred appellant, a copy of his medical record and a statement of accepted facts, to Dr. Craig K. Hertler, a Board-certified otolaryngologist, for a determination as to whether appellant's hearing loss was caused by employment-related noise exposure. In a December 10, 2007 report, Dr. Hertler diagnosed bilateral neurosensory hearing loss, which was distinctly worse in the left ear, with impaired discrimination.[2] He stated that appellant already had significant hearing loss in 1988, with responses of 65 and 60 decibels at 500 and 1,000 Hz in the left ear, and 45 and 45 decibels at 500 and 1,000 Hz. in the right ear. Dr. Hertler indicated that current audiograms did not support presbycusis as a major contributing factor in his overall hearing loss, as presbycusis affects the high frequencies, whereas appellant's hearing loss was primarily low frequency. Acknowledging that appellant worked in a loud industrial environment for many years, Dr. Hertler stated that his noise exposure as a truck driver was unlikely to have caused actual damage to his hearing, particularly given that he was meticulous in wearing hearing protection. He stated that the hearing loss pattern and asymmetry were not at all suggestive of noise-induced hearing loss. In particular, a finding of low frequency hearing loss is the opposite of what one would expect to find in a noise-induced hearing loss case. Additionally, Dr. Hertler noted that the significant impairment in speech discrimination in the left ear versus the right (68 versus 92 percent) could not be accounted for on the basis of a noise-

[1] The Board notes that appellant filed an occupational disease claim (File No. 1402032116) on August 5, 2004, alleging a hearing loss due to work-related noise exposure. The Office denied his claim by decision dated August 30, 2005. In a decision dated March 17, 2006, the Board affirmed the Office's decision, on the grounds that the medical evidence did not establish a causal relationship between established noise exposure and appellant's hearing loss. Docket No. 06-310 (issued March 17, 2006).

[2] A December 10, 2007 audiogram, performed by Diane Heath, an audiologist, accompanied Dr. Hertler's report. Testing of the right ear at frequency levels of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed decibel losses of 50, 50, 50 and 45, respectively, and in the left ear decibel losses of 65, 65, 60 and 55, respectively.

induced hearing loss. He opined that appellant's hearing loss was not related to noise exposure in his federal employment. Dr. Hertler noted several possible causes for appellant's hearing loss, including a genetic predisposition to develop a hearing loss, or an acoustic neuroma.

By decision dated January 9, 2008, the Office denied appellant's claim, on the grounds that the medical evidence failed to establish that appellant's claimed medical condition was causally related to established work-related events.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his claim, including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that the injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[4]

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment, nor the belief that the condition was caused, precipitated or aggravated by his employment, is sufficient to establish a causal relationship.[5] The mere fact that a disease or condition manifests itself or worsens during a period of employment,[6] or that work activities produce symptoms

[3] *Gary J. Watling*, 52 ECAB 357 (2001).

[4] *Solomon Polen*, 51 ECAB 341 (2000).

[5] *Robert G. Morris*, 48 ECAB 238-39 (1996).

[6] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

revelatory of an underlying condition[7] does not raise an inference of causal relation between the condition and the employment factors.

ANALYSIS

It is not disputed that appellant was exposed to work-related noise from 1988 to the present. However, the weight of the medical evidence does not establish that his hearing loss is causally related to his employment-related noise exposure.

Appellant submitted various audiogram results, which were either unsigned or bore illegible signatures, reflecting bilateral hearing loss. However, none of the audiograms were accompanied by a physician's discussion of the employment factors believed to have caused or contributed to appellant's hearing loss. Thus, these reports and audiograms from audiologists do not constitute probative medical evidence.[8]

Appellant also submitted a July 29, 2004 medical clearance form from Dr. Myers, an otolaryngologist, and an accompanying audiogram of that date, indicating that appellant might be a candidate for a hearing aid. As neither report contains an opinion as to the cause of appellant's hearing loss, they are of diminished probative value and are insufficient to establish appellant's claim.[9]

The Office's second opinion physician examined appellant and reviewed the entire medical record, including the December 10, 2007 audiogram. Dr. Hertler diagnosed bilateral neurosensory hearing loss, which was distinctly worse in the left ear, with impaired discrimination. Noting that appellant already had significant hearing loss when he began working at the employing establishment in 1988, and that he was meticulous in wearing hearing protection while working as a truck driver, he opined that appellant's current hearing loss was not related to noise exposure in his federal employment. Dr. Hertler stated that the hearing loss pattern and asymmetry were not at all suggestive of noise-induced hearing loss. He explained that appellant's low frequency hearing loss was the opposite of what one would expect to find in a noise-induced hearing loss case, and that the significant impairment in speech discrimination in the left ear versus the right could not be accounted for on the basis of a noise-induced hearing loss. The Board finds that Dr. Hertler's well-reasoned report constitutes the weight of medical evidence and does not establish appellant's claim.

Because there is no medical evidence of record establishing that appellant's hearing loss was causally related to factors of employment, the Board finds that he has failed to meet his burden of proof.

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[7] *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981).

[8] *See* 5 U.S.C. § 8101(2). This subsection defines the term physician. *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician); *Herman L. Henson*, 40 ECAB 341 (1988) (an audiologist is not considered a physician under the Act). *See also Robert E. Cullison*, 55 ECAB 570 (2004) (the Office does not have to review every uncertified audiogram, which has not been prepared in connection with an examination by a medical specialist).

[9] *See Mary E. Marshall*, 56 ECAB 420, 427 (2005).

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he developed bilateral hearing loss in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 6, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board